Supreme Court, U.S
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No. _____

IN THE

Supreme Court of the United States

October Term, 1996

GUS PETER GLENOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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23 pp

QUESTION PRESENTED

Where state law provides that a pardon "blots out the existence of guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense," and where § 4A1.2(j) of the United States Sentencing Guidelines provides that "[s]entences for expunged convictions are not counted" in calculating the criminal history of an offender, may an offense that has been pardoned by that state nevertheless be counted against a defendant to increase his sentence under the sentencing guidelines?

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED . . . 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. THE DECISION-BELOW CONFLICTS WITH THE DECISIONS AND REASONING OF THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND SECOND CIRCUITS 4

II. THIS CASE RAISES AN IMPORTANT ISSUE REGARDING INTERPRETATION OF A SENTENCING GUIDELINE THAT HAS NOT PREVIOUSLY BEEN REVIEWED OR INTERPRETED BY THIS COURT 9

III. THE DECISION BELOW CONFLICTS WITH THE REASONING OF THIS COURT'S DECISION IN *TUTEN V. UNITED STATES* 10

IV. THE DECISION BELOW VIOLATES THE FULL FAITH AND CREDIT PRINCIPLE AND STATUTE 10

CONCLUSION 11

TABLE OF AUTHORITIES

Pages

Cases

Ex Parte Garland, 71 U.S. 333 (1866) 2-3, 7-9

Gass v. United States, 109 F.3d 677 (11th Cir. 1997) 9

State ex rel. Sokira v. Burr, 580 So.2d 1340 (Ala. 1991) . 2-3, 7-10

Tuten v. United States, 460 U.S. 660 (1983) 10-11

United States v. Beaulieu, 959 F.2d 375 (2nd Cir. 1996) . . . 6-8

United States v. Cerverizzo, 74 F.3d 629 (5th Cir. 1996) 10

United States v. Cox, 83 F.3d 336 (10th Cir. 1996) 10

United States v. Hidalgo, 932 F.2d 805 (9th Cir. 1991) 6-10

United States v. Kammerdiener, 945 F.2d 300 (9th Cir. 1991) 9

United States v. Nicolace, 90 F.3d 255 (8th Cir. 1996) 10

Statutes & Rules

18 U.S.C. § 5021 (1976) (repealed 1984) 9-10

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1738 . . . . . 2, 11

28 U.S.C. § 2255 3

§ 4A1.2(j) of the United States Sentencing Guidelines (U.S.S.G.) . . . . . passim

§ 4A1.3, U.S.S.G. 2, 4

§ 4B1.1, U.S.S.G. 3

California Welfare and Institutions Code § 1772(a) 5,8

33 Vt. Stat. Ann. § 665. 6,8

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

GUS PETER GLENOS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Gus Peter Glenos requests that a writ of certiorari issue to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The July 1, 1997 opinion of the Court of Appeals in the present matter is unreported and is reproduced in the appendix to this petition, p. 1a.

JURISDICTION

The opinion of the Court of Appeals was issued on July 1, 1997. This Court's jurisdiction is invoked pursuant to 28 U.S.C.

§ 1254(1).

STATUTES AND REGULATIONS INVOLVED

§ 4A1.2(j) of the United States Sentencing Guidelines reads as follows: "Sentences for expunged convictions are not counted, but may be considered under § 4A1.3 (Adequacy of Criminal History Category)." 28 U.S.C. § 1738 reads in relevant part: "Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

STATEMENT OF THE CASE

This petition seeks review of a decision of the United States Court of Appeals for the Eleventh Circuit holding that a prior conviction is properly counted against the petitioner for purposes of the United States Sentencing Guidelines even though the petitioner previously was pardoned for that conviction by Alabama authorities, and even though under Alabama law, such a pardon renders the offender as innocent as if he had never committed the offense.

The prior conviction at issue occurred in 1983. In 1988, the petitioner was pardoned under Alabama law for that conviction. Pet. App. 1a-2a, 6a-7a. As the Alabama Supreme Court has stated, such a pardon under Alabama law "necessarily nullifies *all* legal punishment for the offense" and "remove[s] any and all legal incapacities." *State ex rel. Sokira v. Burr*, 580 So.2d 1340, 1345 (Ala. 1991) (emphasis in original). In explaining the meaning of this type of pardon under Alabama law, the Alabama Supreme Court specifically quoted and adopted the language of Justice Field in *Ex Parte Garland*, 71 U.S. 333, 380-381 (1866):

> [The pardon] releases the punishment and blots out the existence of guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense.

Sokira, 580 So.2d at 1342, *quoting*, *Ex Parte Garland*, 71 U.S. at 380-381. *See also*, *Sokira*, 580 So.2d at 1344 ("we adopt the opinion of United States Supreme Court Justice Field, in *Ex parte Garland*").

In 1992, the petitioner was sentenced by the United States District Court for the Southern District of Alabama to 140 months imprisonment for certain drug offenses. The sentence was based on the District Court's enhancement for career offender status under § 4B1.1 of the United States Sentencing Guidelines (U.S.S.G.). To enhance the sentence, the District Court relied upon two prior convictions, including the one which was the subject of the pardon. Pet. App. 1a-2a. Without both convictions, the District Court could not have sentenced the petitioner as a career offender under § 4B1.1.

After sentencing, the petitioner filed a motion for relief under 28 U.S.C. § 2255 contending that the pardoned conviction should not have been counted against him. The United States District Court for the Southern District of Alabama denied relief. On appeal, the United States Court of Appeals for the Eleventh Circuit said the petitioner had raised a "viable issue[]" with respect to the pardoned conviction, but nevertheless affirmed the denial of relief. Pet. App. 2a-3a. As the Court of Appeals noted, under § 4A1.2(j), U.S.S.G., "[s]entences for expunged convictions are not counted" for purposes of establishing criminal history. Pet. App. 3a. However, the Court of Appeals affirmed the counting of the pardoned conviction by quoting the commentary to the guidelines -- specifically, U.S.S.G. § 4A1.2 comment. (n.10), which reads as follows:

> Convictions Set Aside or Defendant Pardoned. A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, e.g., in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted.

Pet. App. 3a-4a. According to the Court of Appeals, "[t]he pardon of [petitioner's] conviction fits neatly and entirely within the definition of convictions that are to be counted in determining criminal history." Pet. App. 4a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS AND REASONING OF THE UNITED STATES COURTS OF APPEALS FOR THE NINTH CIRCUIT AND THE SECOND CIRCUIT.

§ 4A1.2(j), U.S.S.G. states: "Sentences for expunged convictions are not counted, but may be considered under § 4A1.3 (Adequacy of Criminal History Category)." In determining whether sentences that were set aside or pardoned under state law are "expunged" for purposes of § 4A1.2(j), both the Ninth and Second Circuits have looked to and relied upon the effect of such an action under state law. Where the convictions are, in effect, wiped out under state law, the Ninth and Second Circuits have held that they are "expunged" under § 4A1.2(j) and should not be counted in calculating criminal history under the sentencing guidelines. By contrast, the Eleventh Circuit in the present case did not examine Alabama law. Had it done so, and had it followed the analysis of the Ninth and Second Circuits, the conclusion would have been different than the one it reached.

In *United States v. Hidalgo*, 932 F.2d 805 (9th Cir. 1991), the Ninth Circuit held that a second degree robbery conviction which had been "set aside" pursuant to California law -- specifically California Welfare and Institutions Code § 1772(a) -- should not be counted under § 4A1.2(j) of the sentencing guidelines. In doing so, the Ninth Circuit relied specifically upon the language of California law and § 1772(a) of the Welfare and Institutions Code:

> [T]he California statute specifically releases the juvenile delinquent "from all penalties and disabilities resulting from the offense or crime for which he or she was committed . . ." *Id.*
>
> Relying on the above quoted language and U.S.S.G. § 4A1.2(j) it appears obvious that the 1977 conviction was erroneously counted.

932 F.2d at 807.

The Ninth Circuit also took note of the commentary to § 4A1.2(j), which reads:

> Convictions Set Aside or Defendant Pardoned. A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, e.g., in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted.

U.S.S.G. § 4A1.2 comment. (n. 10). According to the Ninth Circuit:

> Unfortunately, the commentary to U.S.S.G. § 4A1.2(j)

> unnecessarily confuses this issue. The commentary sheds little light on the proper outcome and appears to be somewhat internally contradictory. However, its final sentence supports the conclusion we reach here.

932 F.2d at 807.

In *United States v. Beaulieau*, 959 F.2d 375 (2nd Cir. 1992), the Second Circuit noted that "[t]he guidelines do not define expressly the term 'expunged.'" *Id.* at 380. Like the Ninth Circuit, the Second Circuit relied upon state law when examining whether a conviction that was sealed pursuant to a Vermont statute, 33 V.S.A. § 665, should be considered "expunged" under § 4A1.2.

> Under that statute . . . the court may seal all files and records of a prior juvenile conviction . . . . The statute provides that, after the file is sealed, "the proceedings in the matter under this act shall be considered never to have occurred, all index references thereto shall be deleted, and the person, the court, and law enforcement officers and departments shall reply to any request for information that no record exists with respect to such person upon inquiry into any matter." *Id.* § 665(c).

959 F.2d at 380. The Court added:

> The language of the statute indicates that the process of sealing was intended wholly to eliminate any trace of the past proceeding. . . . In view of what we believe to be the intent of the legislature wholly to erase [the defendant's] prior conviction from Vermont's criminal records, we hold that the 1980 conviction should have been deemed "expunged."

Id. at 381.

As the Eleventh Circuit noted in the present case, the pardon received by the petitioner specifically restored his civil and political rights. Pet. App. 1a-2a. See also Pet. App. 6a-7a, which is a reproduction of the pardon document itself. But the Eleventh Circuit did not examine the effect of such a pardon under Alabama law, even though the relevant Alabama legal authorities were cited to that court. The most extensive treatment of the meaning of such a pardon is the Alabama Supreme Court's decision in *Sokira*, where the Court said:

> After a thorough review of the Alabama cases addressing the effect of pardons that expressly restore civil and political rights . . . we adopt the opinion of United States Supreme Court Justice Field, in *Ex Parte Garland*, where he stressed that a pardon, expressly restoring to an individual his civil and political rights, *removes the disabilities* that accompany a conviction.

580 So.2d at 1344 (emphasis in original). The portion of the opinion of Justice Field in *Garland* that was quoted by the Alabama Supreme Court in *Sokira* reads as follows:

> A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and *blots out the existence of guilt, so that in the eyes of the law the offender is as innocent as if he had never committed the offense* . . . . [I]t removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

Ex Parte Garland, 71 U.S. at 380-381, *quoted in, Sokira*, 580 So.2d at 1342 (emphasis added).

In *Sokira*, the Alabama Supreme Court added this:

> [W]e recognize that a pardon that restores to an individual all civil rights and political privileges necessarily nullifies *all* legal punishment for the offense. In other words, . . . a pardon . . . must certainly remove any and all legal incapacities.

580 So.2d at 1345 (emphasis in original).

The effect of a pardon under Alabama law is, for all relevant purposes, akin to the effect of the California law considered dispositive in *Hidalgo* and the Vermont law considered dispositive in *Beaulieau*. Just as the California statute releases the defendant "from all penalties and disabilities resulting from the offense or crime," Cal. Welf. & Inst. Code, § 1772(a), the Alabama pardon "removes the disabilities that accompany a conviction," *Sokira*, 580 So.2d at 1344, "nullifies all legal punishment for the offense," *id.* at 1345, "remove[s] any and all legal incapacities," *id.*, and "removes the penalties." *Id.* at 1342, *quoting, Ex Parte Garland*, 71 U.S. at 380-381. Just as the Vermont statute provides that "the proceedings . . . shall be considered never to have occurred," 33 V.S.A. § 665(c), the Alabama pardon "blots out the existence of guilt, so that in the eyes of the law the offender is as innocent as if he had never committed the offense." *Sokira*, 580 So.2d at 1342, *quoting Ex Parte Garland*, 71 U.S. at 380-381.

In the present case, the Eleventh Circuit relied on the commentary to § 4A1.2(j). Pet. App. 3a-4a. However, as the Ninth Circuit said in *Hidalgo*, the commentary "unnecessarily confuses this issue . . . . sheds little light on the proper outcome and appears to be somewhat internally contradictory." 932 F.2d at 807. Indeed, the commentary assumes that pardons which "restore civil rights" are "unrelated to innocence or errors of law." However, under Alabama law, as previously noted, a pardon restoring civil rights "blots out the existence of guilt, so that in the eyes of the law the offender is as innocent as if he had

never committed the offense." *Sokira*, 580 So.2d at 1342, *quoting Ex Parte Garland*, 71 U.S. at 380-381 [check cite].

Because the Eleventh Circuit's approach and disposition in this case conflicts so dramatically with the holdings of the Ninth and Second Circuits, this Court should grant certiorari to resolve the conflict.

II. THIS CASE RAISES AN IMPORTANT ISSUE REGARDING INTERPRETATION OF A SENTENCING GUIDELINE THAT HAS NOT PREVIOUSLY BEEN REVIEWED OR INTERPRETED BY THIS COURT.

In addition to the conflict described in Section I of this petition, a conflict exists between the Eleventh and Ninth Circuits regarding § 4A1.2(j) and the question of whether a conviction that has been "set aside" under the Federal Youth Corrections Act, 18 U.S.C. § 5021 (1976) (repealed 1984) (FYCA) should be counted under § 4A1.2(j). Relying upon the reasoning in *Hidalgo*, the Ninth Circuit in *United States v. Kammerdiener*, 945 F.2d 300 (9th Cir. 1991), held that such a conviction should not be counted against a defendant, while the Eleventh Circuit, in *Gass v. United States*, 109 F.3d 677 (11th Cir. 1997) -- utilizing the same narrow view it used in the decision below -- held that it should. Other courts of appeals addressing this same FYCA issue have, like the Eleventh Circuit, held that such a conviction should be counted. *See, e.g., United States v. Nicolace*, 90 F.3d 255, 258 (8th Cir. 1996); *United States v. Cox*, 83 F.3d 336, 340 (10th Cir. 1996); *United States v. Cerverizzo*, 74 F.3d 629, 631 (5th Cir. 1996). This conflict among the courts of appeals demonstrates the need for this Court to grant certiorari in a § 4A1.2(j) case and provide guidance to the lower courts on the proper interpretation of that guideline. A decision in the present case would fulfill that function and would assist the lower courts in other § 4A1.2(j) cases, including those dealing with FYCA convictions.

III. THE DECISION BELOW CONFLICTS WITH THE REASONING OF THIS COURT'S DECISION IN *TUTEN V. UNITED STATES*.

The Ninth Circuit in *Hidalgo* relied heavily on this Court's unanimous decision in *Tuten v. United States*, 460 U.S. 660 (1983). In discussing the FYCA in *Tuten*, this Court said:

> Congress recognized that a criminal conviction often carries with it numerous civil and social disabilities. For example, a conviction may result in the loss of the rights to vote, to hold office, to serve on a jury, and to practice various occupations and professions. As in this case, the conviction may also make an offender subject to increased penalties for subsequent convictions. Like various state expungement statutes, § 5021 enables a youth offender to reenter society and conduct his life free from the disabilities that accompany a criminal conviction.

460 U.S. at 664-665. Clearly, the Court included among the "civil and social disabilities" of a criminal conviction the fact that it "may . . . make an offender subject to incresed penalties for subsequent convictions." The Alabama pardon at issue in this case "removes the disabilities that accompany a conviction," *Sokira*, 580 So.2d at 1344, and "remove[s] any and all legal incapacities." *Id.* Under the common-sense understanding expressed in *Tuten*, this necessarily means that the pardon erases the fact that the prior conviction may be used to enhance the penalties for later convictions. Because the Eleventh Circuit held otherwise, its decision conflicts with the reasoning in *Tuten*.

IV. THE DECISION BELOW VIOLATES THE FULL FAITH AND CREDIT PRINCIPLE AND STATUTE.

By failing to give the Alabama pardon the effect it was intended to have under Alabama law, the Eleventh Circuit

violated the principle of full faith and credit as expressed in 28 U.S.C. § 1738:

> Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of certiorari should issue to review the decision of the Eleventh Circuit in this case.

Respectfully Submitted,

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Counsel for Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 95-6072, 96-6414
Non-Argument Calendar

D.C. Docket Nos. CV94-0864, CR92-00034-AH-M

GUS PETER GLENOS, Petitioner-Appellant,

v.

UNITED STATES OF AMERICA, Respondent-Appellee.

Appeals from the United States District Court
for the Southern District of Alabama

(July 1, 1997)

Before DUBINA, BLACK and BARKETT, Circuit Judges.

PER CURIAM:

Pro se Appellant Gus Peter Glenos appeals the district court's denial of his motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 and his subsequent motion for reconsideration. We affirm the district court's denial of both motions.

BACKGROUND

In 1992, Appellant was sentenced to 140-months' imprisonment for various drug offenses. Appellant previously had been convicted of two felonies -- in 1974 and 1983. Nevertheless, the Alabama State Board of Pardons and Paroles

pardoned him with respect to his 1983 conviction, restoring his civil and political rights as to that conviction.[1]

At his 1992 sentencing, the district court enhanced Appellant's sentence for career offender status based on his prior felony convictions. See U.S.S.G. § 4B1.1. After sentencing, Appellant filed the § 2255 motion at issue in this appeal, and the district court denied the motion. Appellant filed a notice of appeal from the denial of the § 2255 motion. Before we acted on that appeal, Appellant filed in district court a motion which ultimately became his motion for reconsideration of the denial of the § 2255 motion. In the motion for reconsideration, Appellant argued that his 1983 conviction should not be considered in determining his career offender status because he was pardoned with respect to that conviction. The district court denied the motion, and Appellant filed a second notice of appeal. Upon the Court's own motion, we consolidated the two appeals -- the appeal from the denial of the original § 2255 motion and the appeal from the denial of the motion to reconsider.

DISCUSSION

In this consolidated appeal, Appellant raised three viable issues, all related to the inclusion of his 1983 conviction in the

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[1]In his § 2255 motion, Appellant suggested that he received pardons with respect to both his 1974 and 1983 convictions. Yet on appeal, he appears to agree with the Government's position that he was pardoned only with respect to the 1983 conviction.

computation of his career offender status:[2] (1) the district court erred in denying the § 2255 motion because the 1983 conviction should not be included to determine Appellant's career offender status; (2) the district court should not have applied U.S.S.G. § 4B1.1 comment. (n.10) because the Sentencing Commission exceeded its authority in promulgating that comment; and (3) Appellant's counsel was ineffective for failing to object to the use of the 1983 conviction in determining career offender status.[3]

Appellant's sentence was enhanced under U.S.S.G. § 4B1.1 based on the district court's determination that his two prior felony convictions qualified him as a career offender. Yet the Guidelines also instruct that "[s]entences for expunged convictions are not counted" for purposes of establishing criminal history, U.S.S.G. § 4A1.2(j):

> Convictions Set Aside or Defendant Pardoned. A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, e.g., in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to

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[2]Appellant also raises for the first time on appeal two issues which he did not raise before the district court: (1) equal protection is violated when pardoned offenses serve as predicate offenses under U.S.S.G. § 4B1.1 but not under § 922(g)(1); and (2) the rule of lenity should apply to him, given his harsher punishment under § 4B1.1. We generally will not consider issues raised for the first time on appeal.. Walter v. Jones, 10 F.3d 1569, 1572 (11th Cir.), cert. denied, 114 S.Ct. 2111 (1994).

[3]Appellant raised this issue as his only issue in his § 2255 motion. Nevertheless, we consider this issue last because the result is governed by the resolution of the two previous issues, both of which were raised in the motion to reconsider.

> be counted. However, expunged convictions are not counted.

U.S.S.G.§ 4A1.2 comment. (n.10).

In his motion for reconsideration, Appellant argued (1) that his prior 1983 conviction should be deemed an expunged conviction and so should not be counted in his criminal history, and (2) that to the extent that commentary note 10 changes the definition of expunged conviction to exclude his situation, the Sentencing Commission exceeded its authority in promulgating that rule. We review the denial of a motion for reconsideration under Fed. R. Crim. P. 60(b) for abuse of discretion. High v. Zant, 916 F.2d 1507, 1509 (11th Cir. 1990), cert. denied, 111 S. Ct. 1432 (1991).

In comentary note 10, the Commission explicitly recognized that the laws of various states treat expungement and pardon in different ways. The pardon of Appellant's 1983 conviction fits neatly and entirely within the definition of convictions which are to be counted in determining criminal history. Appellant's attempts to use a common usage definition of "expungement" are inapplicable because commentary note 10 defines expunged convictions and distinguishes them from pardoned convictions. Therefore, the district court did not abuse its discretion when it denied the motion to reconsider because commentary note 10 requires that Appellant's pardoned conviction be included in the determination of his criminal history.

Appellant further argued in his motion for reconsideration that in promulgating commentary note 10, the Sentencing Commission exceeded its authority and violated the Rooker-Feldman doctrine and the Full Faith and Credit Clause. Under the Rooker-Feldman doctrine, a district court cannot

review final state court judgments because such review may be had only in the United States Supreme Court. Powell v. Powell, 80 F.3d 464, 466 (11th Cir. 1996). Appellant, however, cites no authority supporting his conclusion that the Guidelines or their commentary violate the Rooker-Feldman doctrine. Nor do we discern any relevance of that doctrine to Appellant's situation. Therefore the district court appropriately followed the Commission's dictates as set out in U.S.S.G. § 4A1.2 comment. (n.10), and the court did not abuse its discretion in denying Appellant's motion to reconsider.

Finally, in light of the discussion above, Appellant cannot show that his counsel was ineffective for failing to object to the inclusion of this conviction. In order to prove that counsel was ineffective, Appellant must show that his attorney's performance was deficient and that he suffered some prejudice as a result of that deficiency. Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984). A claim of ineffective assistance of counsel presents a mixed question of law and fact; therefore we review this issue de novo. See Weeks v. Jones, 26 F.3d 1030, 1034 (11th Cir. 1994), cert. denied, 115 S.Ct. 1258 (1995). Above we held that the district court did not err in considering the 1983 pardoned conviction in the calculation of Appellant's criminal history. Therefore, Appellant can show neither that his attorney erred in failing to object to the proper consideration of that conviction, nor that he suffered any prejudice from his attorney's failure to object.

AFFIRMED.

STATE BOARD OF PARDONS AND PAROLES
Montgomery, Alabama

CERTIFICATE OF PARDON WITH RESTORATION OF CIVIL AND POLITICAL RIGHTS

KNOW ALL MEN BY THESE PRESENTS:

It having been made to appear to the Alabama State Board of Pardons and Paroles that Gus Peter Glenos III A-10, 23 was convicted in Federal County on March 15, 1983 of Conspiracy to Poss. and Distribute and Import Marj., was sentenced to a term of 8 yrs. (6-7-85 sentence set aside; sentenced to time served and released).

And it further appearing to the Board from the official report of the Parole Officer which is a part of the record in this case, and with no further information to the contrary, that the above named has so conducted himself as to demonstrate his reformation and to merit pardon with restoration of civil rights;

NOW, In compliance with the authority vested in the State Board of Pardons and Paroles by the Constitution and the Laws of the State of Alabama to grant pardons and to restore civil and political rights, it is

ORDERED that a pardon be granted to the above named as a result of the above stated conviction, and all prior disqualifying convictions, and it is further ordered that all civil and political rights which were forfeited as a result of the conviction be and they are hereby restored.

GIVEN UNDER THE HAND AND SEAL of the State Board of Pardons and Paroles, this the 11th day of October, 1988.

STATE BOARD OF PARDONS AND PAROLES

By Executive Director